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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1967
No. 535

MICHELE MARCHESE and JESSE DEL BONO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Rehearing of Denial of Certiorari to the United States Court of Appeals for the Ninth Circuit.

This is a petition for rehearing of this Court's order of November 6, 1967, denying the petition for writ of certiorari, and is filed pursuant to Rule 58(2) of the Rules of this Court.

Intervening circumstances of substantial effect have occurred since the filing of the Petition, the Opposition to Petition filed by the United States, and the Reply to the Opposition filed by petitioners.

The circumstances are these:

1. The petition for writ of certiorari of *Charles Katz v. United States* (369 F. 2d) to the Court of Appeals for the Ninth Circuit, having been previously granted by this Court, was argued before the Court on October 17, 1967. However, this Court has not decided the case. Important questions and issues of law involved therein are pertinent and relevant to the instant case. One of these questions is whether there is an

invasion of the rights of privacy under the Fourth Amendment by the use of an electronic transmitting or recording device, even if no physical trespass on the premises of the defendant was committed. Furthermore, the case of *Beatty v. United States*, 377 F. 2d 181, which involved the use of a hidden transmitting device, is now pending on certiorari before this Court.

2. The continued pervasive and unlawful, as we contend, use of evidence obtained by electronic eavesdropping is an ever-present one, constantly being presented to this Court and other federal and state courts, which calls for a definite pronouncement by this Court. The newspapers and other news media are replete with instances of the use of electronic eavesdropping devices used by law enforcement officers. These matters are the subject of various bills being introduced in legislative bodies, including the Congress of the United States.

The general use of such devices was illustrated by a television program telecast a short time ago by a station in Los Angeles, California. The manufacturer of electronic eavesdropping devices, with a manufacturing plant devoted to research and development of such devices, was interviewed by a member of the station's news staff. The manufacturer stated that he was manufacturing various types of such devices, whereby a conversation could be overheard, without the eavesdropper having to enter the premises. In fact, he stated that by using one of his devices one could overhear a conversation in a closed room from 100 to 200 feet away. When asked to whom such devices were sold, the manufacturer stated he sold to anyone who wished to buy; however, the F.B.I. and other government and law enforcement officers were his best customers, and if the courts outlawed the use of such devices, his business would

be seriously impaired.

3. This Court, by dicta or implication, in *Lopez v. United States,* 373 U.S. 427, apparently overruled the case of *On Lee v. United States,* 343 U.S. 747, but did not do so unequivocally and definitely. It also did not rule on the particular issue of the use of a hidden transmitting device in *Massiah v. United States,* 377 U.S. 201. As a consequence, the question is still left open and the courts are in disagreement and conflict as to whether the use of a hidden transmitting device is an invasion of the rights of privacy under the Fourth Amendment.

For example, in the recent cases of *Hadjir v. Florida,* 189 So. 2d 230, and *Stone v. United States,* 232 F. Supp. 396, the courts ruled that the *On Lee* case had, in effect, been overruled by *Lopez.* However, the Court of Appeals for the Ninth Circuit continues to treat the use of a hidden transmitting device as authorized by *On Lee* and not constituting a violation of the Fourth Amendment. It did so in the instant case, apparently relying on an inapposite case of *Osborn v. United States,* 385 U.S. 323; and it has consistently in the past ruled accordingly on the authority of *On Lee.* (*Battaglia v. United States,* 349 F. 2d 556; *Carbo v. United States,* 314 F. 2d 718; *Todisco v. United States,* 298 F. 2d 208; see also *Beatty v. United States, supra,* 377 F. 2d 181.)

To prevent further uncertainty as to the said issue, and to prevent numerous writs arising from uncertainty, we respectfully urge this Court to settle the question definitely once and for all whether the use of such electronic transmitting devices is a violation of a defendant's rights of privacy.

4. We further urge this Court, for the guidance of the courts, to define the powers of the United States District Courts

in the granting of relief and the type and character of relief which may be granted under habeas corpus and the motion procedure under Section 2255 of Title 28 U.S.C., especially since, as pointed out in the petition for certiorari, there is a direct conflict between the decision of the Ninth Circuit in the instant case and decisions in other circuits. This question should be settled to prevent other prospective writs from contemplated filing or appeals on said issue.

CONCLUSION

We respectfully urge the petition for rehearing and the petition for writ of certiorari be granted.

Respectfully submitted,

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BRUCE I. HOCHMAN
Attorneys for Petitioner
Michele Marchese

RUSSELL E. PARSONS
Attorney for Petitioner
Jesse Del Bono

CERTIFICATE

I certify that the within Petition for Rehearing is presented in good faith and not for delay and that the Petition is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

RUSSELL E. PARSONS

Dated: November 28, 1967

PROOF OF SERVICE BY MAIL
1013a and 2015.5 C.C.P.

STATE OF CALIFORNIA)
) ss.
County of Los Angeles)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on November 28, 1967, I served the within Petition for Rehearing of Denial of Certiorari to the United States Court of Appeals for the Ninth Circuit (Marchese v. United States – No. 535) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Solicitor General of the United States
Washington, D. C. (3 copies)

Wm. M. Byrne, Jr., United States Attorney
U. S. Courthouse
Los Angeles, Calif. (3 copies)

Clerk, U. S. Court of Appeals
For the Ninth Circuit
P. O. Box 547
San Francisco, Calif. 94101
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 28th 1967 at Los Angeles, California.

R. A. Shamlian

Signature

Subscribed and sworn to before me
this day of November, 1967.

(Orig. + 40 cys. lodged with the Supreme Court of the United States.)

Notary Public in and for the
State of California.